STATE OF MICHIGAN

COURT OF APPEALS

CRAIG T. STEVENS and JORDAN A. STEVENS, Plaintiffs-Appellants,	UNPUBLISHED September 22, 2011
v	No. 298167 Lapeer Circuit Court
BRUNO MOSER LIVING TRUST, KENNETH S. MACK, ANN P. MACK, JACK JOSTOCK, RYAN DOYLE, and LAPEER COUNTY ROAD COMMISSION, Defendants-Appellees.	LC No. 07-039043-CZ

Before: SERVITTO, P.J., and MARKEY and K.F. KELLY, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants Mack and Moser summary disposition. Plaintiffs are also appealing a prior order that granted summary disposition in favor of defendants Lapeer County Road Commission (LCRC), Jostock and Doyle. We affirm in part and reverse in part.

I. PROCEDURAL BACKGROUND

Plaintiffs and defendant Macks are adjoining landowners. Plaintiffs filed a complaint for quiet title against defendants Mack and the Macks' predecessor in interest, defendant Moser, alleging that plaintiffs had obtained title to a triangular parcel of land between the two properties by way of adverse possession and acquiescence. Plaintiffs alleged that they were able to "tack on" to the time that their predecessor in interest maintained the disputed parcel as part of the improved portion of plaintiffs' driveway, resulting in a fifteen-year period of continuous hostile use. Plaintiffs also filed claims for trespassory nuisance and negligence against LCRC and its employees, Jostock (foreman) and Doyle (assistant engineer), arguing that the installation of a culvert and drainage system pursuant to a private contract with the Macks created unnatural water conditions and accumulations on plaintiffs' property.

The trial court granted summary disposition in favor of defendants LCRC, Jostock and Doyle, finding that plaintiffs' claims were barred by the doctrine of governmental immunity and rejecting plaintiffs' claims that the work was non-governmental and proprietary in nature.

The trial court later granted summary disposition in favor of defendants Mack and Moser, finding that plaintiffs failed to show a claim under either adverse possession or acquiescence.

Plaintiffs now appeal as of right.

II. GOVERNMENTAL IMMUNITY

Plaintiffs first argue that the trial court erred in granting defendants LCRC, Jostock and Doyle summary disposition. Plaintiffs claim that the work performed by those defendants was the result of privately negotiated contract between LCRC and defendants Mack. LCRC performed the work, not because it was necessary for the public's good, but because of a private contract between the parties; therefore, it was not a "governmental function." Additionally, plaintiffs argue that the work performed was proprietary in nature in that it was meant to produce a profit. Plaintiffs allege that because governmental immunity was inapplicable to LCRC, individual defendants Jostock and Doyle were similarly liable. We disagree.

Summary disposition was requested pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). In rendering its decision, the trial court looked beyond the mere pleadings, an indication that it was relying on either MCR 2.116(C)(7) or (C)(10). *Capitol Properties Group, LLC v 1247 Center Street, LLC*, 283 Mich App 422, 425; 770 NW2d 105 (2009). Summary disposition pursuant to MCR 2.116(C)(7) is appropriate when, viewing the evidence in a light most favorable to the nonmoving party, the moving party demonstrates that a claim is barred because of immunity granted by law. MCR 2.116(C)(7); *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The moving party under a MCR 2.116(C)(7) motion may present affidavits, depositions, admissions, or other documentary evidence in support of its motion, and the contents of the complaint are deemed fact unless contrary evidence is presented. *Odom*, 482 Mich at 466. Summary disposition under MCR 2.116(C)(10) is appropriate only when the moving party can demonstrate there are no genuine issues of material fact and it is entitled to judgment as a matter of law. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). The applicability and interpretation of statutes addressing governmental immunity are questions of law that are reviewed de novo on appeal. *County Rd Ass'n of Mich v Governor*, 287 Mich App 95, 117-118; 782 NW2d 784.

MCL 691.1407(1) provides that, "[e]xcept as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." "Governmental function" is defined in MCL 691.1401(f) as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law."

There is no question the county road commissions are authorized to do the type of work performed in this case. MCL 224.19(1) provides: "[t]he board of county road commissioners may grade, drain, construct, gravel, shale, or macadamize a road under its control, make an improvement in the road, and may extend and enlarge an improvement. The board may construct bridges and culverts on the line of the road, and repair and maintain roads, bridges, and culverts."

Plaintiffs allege that these defendants behaved in a manner that removed them from the scope of government immunity. While defendants may have been statutorily authorized to do

the work in question, plaintiffs claim the work was the result of a private contract with defendants Mack and was, therefore, outside the protection of governmental immunity because it was no longer a "governmental function." Plaintiffs cite *Pardon v Finkel,* 213 Mich App 643; 540 NW2d 774 (1995), in support of their argument. In *Finkel,* this Court found that governmental immunity did not apply to a situation in which county sheriff deputies were used as security crowd control during concerts at a private facility because "the relationship between the county and Pine Knob was akin to that of a private security guard situation, and thus the county was engaged in a nongovernmental function, thereby precluding the immunity defense." *Pardon,* 213 Mich App at 648. This Court admonished that, in determining whether an agency is engaged in a governmental function, "the focus must be on the general activity, not the specific conduct involved at the time of the tort." *Pardon,* 213 Mich App at 649. Because the general activity was crowd control and was the result of a private agreement, duty to the public was not implicated and the deputies were acting outside of the scope of immunity. *Id.*

Pardon is distinguishable from the case at bar. Here, defendants LCRC, Jostock and Doyle were clearly performing work within the ambit of MCL 224.19(1). There are absolutely no allegations that these defendants were working outside of the scope of the statute. There is nothing in plaintiffs' pleadings to indicate that defendants LCRC, Jostock and Doyle were doing anything other than what they were authorized to do by statute.

Alternatively, plaintiffs argue that, even if the work performed fell within the ambit of "governmental function," the contract was entered into for the primary purpose of pecuniary profit, removing it from the protection of immunity. MCL 691.1413 provides:

> The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees.

Thus, even if it can be shown that an agent was acting within the realm of a governmental function, immunity does not apply if it can also be shown that the activity constituted the performance of a proprietary function. *Hyde v University of Mich Bd of Regents,* 426 Mich 223, 253-254; 393 NW2d 847 (1986). However, "only activities which are conducted primarily for the purpose of producing a pecuniary profit, *and* which are not normally supported by taxes or fees, are proprietary functions under § 13. The fact that a governmental agency produces a pecuniary profit may be evidence that the agency is engaged in a proprietary function, but it is not conclusive evidence. The focus instead should be on the primary intended purpose of the governmental activity and how the activity is normally funded." *Hyde,* 426 Mich at 231 (emphasis in original). The fact that an agency generates a profit is not conclusive evidence that the activity is pecuniary in nature; rather, the relevant inquiry is whether "the *primary* purpose is to product a pecuniary profit." *Hyde,* 426 Mich at 258-259. Also relevant is how the profit is deposited and spent. "If the profit is deposited in the governmental agency's general fund or used to finance unrelated functions, this could indicate that the activity at issue was intended to be a general revenue-raising device. If the revenue is used only to pay current and long-range

expenses involved in operating the activity, this could indicate that the primary purpose of the activity was not to produce a pecuniary profit." *Hyde*, 426 Mich at 259.

To be excluded from the proprietary function exception to immunity, the activity need not *actually* be supported by taxes or fees; rather, the activity need only be one which is *normally* supported by taxes or fees." *Hyde,* 426 Mich at 260 n 32 (emphasis in original). Again, there is absolutely nothing in plaintiffs' complaint to refute the fact that installation and maintenance of culverts are the types of activities specifically paid for with tax dollars.

Also instructive is *Harris v University of Mich Bd of Regents,* 219 Mich App 679; 558 NW2d 225 (1996), which demonstrates that, given the mandate that "governmental function" be read broadly, it is difficult to establish a proprietary function exception.

Defendants were also properly granted summary disposition on plaintiffs' claim of trespassory nuisance. In *Pohutski v City of Allen Park,* 465 Mich 675; 641 NW2d 219, the Michigan Supreme Court stated that "the plain language of the governmental tort liability act does not contain a trespass-nuisance exception to governmental immunity. Trespass-nuisance simply is not one of the five exceptions to immunity set forth in the governmental tort liability act." *Pohutski,* 465 Mich at 689-690. Because plaintiffs cannot plead in avoidance of governmental immunity, their claim for trespass nuisance cannot survive. See also *Blue Harvest, Inc v Dep't of Transp,* 288 Mich App 267; 792 NW2d 798 (2010).

Finally, the standard for individual immunity of governmental employees is as follows:

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. [MCL 691.1407(2).]

"Gross negligence" is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). "Evidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Maiden v Rozwood,* 461 Mich 109, 122-123; 597 NW2d 817 (1999). Instead, a plaintiff must allege conduct of

"almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). There is simply nothing in plaintiffs' pleadings that would remove defendants Jostock and Doyle from the protection of governmental immunity. Plaintiffs allege nothing more than ordinary negligence against individual defendants Jostock and Doyle. The claim against them was properly dismissed.

III. ADVERSE POSSESSION

Plaintiffs next argue that the trial court erred in granting summary disposition in favor of defendants Mack and Moser. The only element of adverse possession addressed by the parties and the lower court was the length of time plaintiffs exercised control over the disputed piece of land. Plaintiffs maintain that the trial court erred in relying exclusively on the affidavit of plaintiffs' predecessor in interest, Debra Guzmand a/k/a Debra Barash, who claimed that neither she nor any of her agents ever maintained the property in dispute, while ignoring four affidavits of other individuals that the parcel in dispute was, in fact, improved and maintained by the Guzmans. We agree that a genuine issue of fact existed regarding plaintiffs' claim and that the lower court erred in granting defendants Mack and Moser summary disposition. However, we must make it clear that the sole issue addressed in the lower court was whether plaintiffs held the property for the requisite period of time to claim adverse possession. Defendants Mack and Moser contested only the length of time plaintiffs exercised control over the property.[1] The lower court's discussion was similarly limited to whether plaintiffs were entitled to "tack onto" the Guzman's prior ownership. Therefore, this Court's findings are limited to whether a question of fact exists as to whether plaintiffs held the property for the requisite number of years. We express no opinion on the remaining factors to be considered when determining whether plaintiffs obtained title by adverse possession or acquiescence.

As mentioned above, this Court reviews a trial court's decision on a motion for summary disposition de novo. *Latham*, 480 Mich at 111. In rendering its decision, the trial court looked beyond the mere pleadings, an indication that it was relying on MCR 2.116(C)(10). *Capitol Properties Group*, 283 Mich App at 425. Summary disposition under MCR 2.116(C)(10) is appropriate only when the moving party can demonstrate there are no genuine issues of material fact and it is entitled to judgment as a matter of law. *Rose*, 466 Mich at 461.

MCL 600.5801 provides in part that "[n]o person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make the entry first accrued to himself or to someone through whom he claims, he commences the action or makes the entry within the periods of time prescribed by this section . . . (4) In all other cases under this section, the period of limitation is 15 years." A party claiming adverse possession must show "'clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous and uninterrupted for the statutory period of fifteen years.'" *Canjar v Cole*, 283 Mich App 723, 731; 770 NW2d 449 (2009), quoting *Kipka v*

[1] Defendants Mack and Moser make more extensive arguments in their appellate brief, though these arguments were not made in the lower court.

Fountain, 198 Mich App 435; 499 NW2d 363 (1993). After the fifteen-year period ends, the adverse possessor acquires legal title to the property and the record owner's title is extinguished. *Gorte v Dep't of Transp*, 202 Mich App 161, 168-169; 507 NW2d 797 (1993). The term "hostile" does not denote a showing of ill will or malice towards the true owner; rather, it requires that the claimant use the property without permission and in a manner inconsistent with the rights of the true owner. *Wengel v Wengel*, 270 Mich App 86, 92; 714 NW2d 371 (2006). Permissive use of the disputed area cannot ripen into a claim of adverse possession. *Kipka*, 198 Mich App at 438.

The fifteen-year period begins to run when the rightful owner has been disseised of the property, meaning that the true owner has been displaced by another exercising the powers of ownership over the property. *Kipka*, 198 Mich App at 439. An adverse claimant is permitted to add his predecessor's period of possession to his own period of possession. *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001). Tacking requires "privity of estate," which can be shown by either mention of the land in the deed or parol references at the time of the conveyance. *Killips*, 244 Mich App at 260.

Alternatively, plaintiffs claim that they have acquired title to the disputed property by way of acquiescence, which seeks to promote peaceful resolution of boundary disputes. *Killips*, 244 Mich App at 260. In contrast to a claim of adverse possession, a claim of acquiescence does not require that the possession be hostile or without permission; rather, a litigant may seek title by acquiescence in three different ways: (1) acquiescence for the statutory period, (2) acquiescence following a dispute and agreement; and, (3) acquiescence arising from intention to deed to a marked boundary. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Plaintiffs base their claim on the first of these theories.

> A claim of acquiescence to a boundary line based upon the statutory period of fifteen years, MCL 600.5801(4) ..., requires merely a showing that the parties acquiesced in the line and treated the line as the boundary for the statutory period, irrespective of whether there was a bona fide controversy regarding the boundary. This theory of acquiescence does not require that the possession be hostile or without permission as would an adverse possession claim. Further, the acquiescence of predecessors in title can be tacked onto that of the parties in order to establish the mandated period of fifteen years. Although Michigan precedent has not defined an explicit set of elements necessary to satisfy the doctrine of acquiescence, case law has held that acquiescence is established when a preponderance of the evidence establishes that the parties treated a particular boundary line as the property line. [*Mason v City of Menominee*, 282 Mich App 525, 529-530; 766 NW2d 888 (2009).]

A claim for acquiescence can be sustained even though one party is aware that the actual boundary is not the line that the other party treats as the boundary, as long as no action is taken by the owner to prohibit the non-owner's use of the property or the owner does not indicate to the non-owner that the acquiesced boundary is not the actual boundary. *Killips*, 244 Mich App at 260.

Plaintiffs' adverse possession and acquiescence claims depend upon tacking onto the possessory period of their predecessors in title – the Guzmans. To defeat plaintiffs' ability to tack, defendants presented the affidavit of Debra Barash f/k/a Debra Guzman, which provides:

> 1. That I was previously married to JESSE GUZMAN and owned property located at 2833 Casey Road, Metamora, Michigan and further that I and my previous husband built the house and entrance located on said property in 1984;
>
> 2. That I personally resided at the property located at 2833 Casey Road, Metamora, Michigan until August, 1994, at which time possession of said house was transferred to CRAIG T. STEVENS and JORDAN A. STEVENS pursuant to a sale;
>
> 3. That neither I, my lawn service, or anyone under my control, maintained our property beyond the gates;
>
> 4. That I am familiar with where the property stake is along the North Casey Road line and exactly where the strip of property which is in dispute is located and I have never maintained the same.

Plaintiffs complain bitterly that their documentary evidence was effectively ignored by the trial court; however, two of the four affidavits in support of plaintiffs' response were inadequate to defeat defendants' motion for summary judgment. The affidavit of Shirley Littlefield provides:

> 1. I was a real estate agent in the Metamora area of over twenty years.
>
> 2. I was the agent that showed the Guzmans' property at 2833 Casey Road, Metamora, Michigan beginning in 1991 until its selling date of 8-16-1994.
>
> 3. I was familiar with the property as I boarded my horses nearby and passed it often.
>
> 4. The driveway as constructed traverses the triangular piece of property that is the subject matter of the lawsuit presently pending in Lapeer County Circuit Court, being case number 07-039043-CZ(H).
>
> 5. The Guzmans maintained the property adjacent to its driveway between the gates and Casey Road, including regularly mowing the lawn and landscaping the area.

The affidavit of Diane Kurtz provides:

> 1. I was the real estate agent that sold Guzmans' property at 2833 Casey Road, Metamora, Michigan, to the Stevens in August of 1994.

2. I showed the property numerous times while it was on the market from approximately 1991 to its selling date of 8-16-1994.

3. I reside at 4747 Barber Road, Metamora, Michigan, which is approximately one-half mile west of the subject property.

4. While the property was on the market, the driveway as constructed traversed the triangular piece of property that is the subject matter of the lawsuit. The property adjacent to the driveway was always properly maintained by the owners. The maintenance included regular lawn mowing and general landscaping.

Each affidavit was conclusory. The affidavits do not contain any facts showing that the affiants had personal knowledge that Guzman maintained the disputed property. The affiants do not claim to have personally witnessed Guzman mowing, improving, or maintaining the property.

MCR 2.119(B) provides:

(1) If an affidavit is filed in support of or in opposition to a motion, it must:

(a) be made on personal knowledge;

(b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and

(c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit.

MCR 2.116(G)(6) further provides that "[a]ffidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)--(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." Clearly the foregoing affidavits were insufficient to create a genuine issue of material fact in this case. Consequently, because the affidavits lacked the necessary facts to establish that the affiants had any personal knowledge about the events in question, the trial court properly refused to consider them.

More problematic, however, is the affidavit of Leszek Bartkiewicz, which provides:

1. I am the music director at St. Joseph Church in Lake Orion, Michigan.

2. I resided at 2851 Casey Road, Metamora, Michigan, from 1983 until March of 1995, which is the property presently owned by Ken and Ann Mack.

3. During the time I resided at 2851 Casey Road, I witnessed the Guzmans, who were the residents of 2833 Casey Road, and their employees clear the parcel of land which is the subject of this lawsuit.

4. That the subject parcel of land was once overgrown with bushes and the Guzmans cleared the parcel, which is now the driveway, and backfilled and installed gravel and cement down to Casey Road and installed the stone gates that exist today.

5. After cleaning the parcel, the Guzmans routinely mowed and maintained the entire area on both sides of their driveway to Casey Road.

6. I witnessed the Stevens maintain said parcel of land upon their ownership of the land at 2833 Casey Road and/or their employees.

Unlike the other two affidavits, Bartkiewicz's affidavit is based on personal knowledge and appears to create an issue of fact as to whether the Guzmans maintained the property and, in so doing, allowed plaintiffs to "tack on" to their claim of possession.

Additionally, plaintiffs presented the (self-serving) affidavit of Craig Stevens, which provides:

1. I have lived on Casey Road in Metamora since 1987 and routinely drove by my present property on my way to work each day.

2. The parcel that I eventually purchased had been owned by the Guzmans since 1985. During their period of their ownership I witnessed the clearing, backfilling and grading of the property during the construction of their driveway that extended to Brocker Road. I witnessed the eventual landscaping and continued maintenance of the property on both sides of the driveway.

3. I became interested in the possibility of the purchasing the Guzman property in 1993 after it had been listed for sale for several years. Prior to purchasing the property I had several conversations with Bruno Moser who owned the adjacent parcel and Jessie Guzman. Both Jessie and Bruno stated to me on several occasions that they always believed that the westerly traveled edge of Brocker Road and Casey Road was the boundary line of their respective parcels.

4. At the time I purchased the property in 1994 I believed as Bruno did, that the westerly traveled edge of Brocker Road and Casey Road was the boundary line of our respective parcels.

5. During the entire period of my ownership, my wife Jordan and I maintained and landscaped both sides of our driveway all of the way out to Brocker Road. We routinely mowed the grass, planted flowers and bushes and otherwise landscaped the property to enhance the beauty and appearance of the front entrance to our property.

6. Our exclusive maintenance of the property continued unabated until the Macks privately contracted with the Road Commission several years ago

> to address some draining issues. From that point forward the Macks have continued to interfere with our ability to maintain and landscape the property.

As to both the claim of adverse possession as well as the claim of acquiescence, the only issue addressed by the parties and the lower court was whether the requisite fifteen-year period had been satisfied. None of the other considerations – whether the use was hostile, open, notorious, and continuance – were addressed. The lower court stated only that "[p]laintiffs offered no evidence to dispute the nature of the Guzmans' use of the property." However, two of the four affidavits create an issue of fact as to whether plaintiffs can tack on to their predecessor in interest. Although Debra Barash's affidavit contradicts the facts set forth in the affidavits of Craig Stevens and Leszek Bartkiewicz, it is not appropriate to weigh matters of credibility when deciding a motion for summary disposition. *Morris v Allstate Ins Co*, 230 Mich App 361, 364; 584 NW2d 340 (1998). Rather, when the truth of an assertion of material fact depends on the credibility of the affiant, a genuine issue of fact exists and summary disposition is inappropriate. *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988).

IV. CONCLUSION

The trial court did not err in granting summary disposition to defendants LCRC, Jostock and Doyle where plaintiffs' claims were clearly barred by governmental immunity.

The trial court erred in granting summary disposition to defendants Mack and Moser where an issue of fact remained as to whether plaintiffs could tack onto the possessory period of their predecessors in title – the Guzmans.

We affirm in part, reverse in part, and remand for further proceedings. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly